(35) APR

HIGH COURT OF CHHATTISGARH, BILASPUR

D.B: HON'BLE SHRI L.C. BHADOO &
HON'BLE SHRI SUNIL KUMAR SINHA, J, J

Criminal Appeal No.73 of 2003

Bharat Singh and another

Vs.

State of Chhattisgarh

Criminal Appeal No.251 of 2003

Bholanath @ Motali and another

Vs.

State of Chhattisgarh

Judgment for consideration

Sd/-
Sunil Kumar Sinha
Judge

Hon'ble Shri Justice L.C. Bhadoo

I agree

Sd/-
L.C. Bhadoo
Judge

Post for Judgment: .10.2007

Sd/-
Sunil Kumar Sinha
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.73 of 2003

APPELLANTS

1. Bharat Singh, son of Mohan Singh, aged about 20 years,
2. T. Jagannath @ Jagga s/o T. Kamayya Naidu, aged about 22 years,

Both residents of Century Cement, Baikunth, Distt. Raipur (C.G.)

Versus

RESPONDENT

State of Chhattisgarh, Through the District Magistrate, Raipur (C.G.)

Criminal Appeal No.251 of 2003

APPELLANTS

1. Bholanath @ Motali, son of Dukhuram Dhruv, aged about 19 years,
2. Shankar Lal, s/o Purushottam Dhruv, aged about 22 years

Both residents of Century Cement, Baikunth, Distt. Raipur (C.G).

Versus

RESPONDENT

State of Chhattisgarh, Through District Magistrate, Raipur (C.G.)

Criminal Appeals under section 374(2) of the Code of Criminal Procedure

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Appearance:

Smt. Indira Tripathi & Shri S.C. Verma, counsel for the Appellants.

Shri Ravindra Agrawal, Panel Lawyer, for the State.

DB: Hon'ble Shri L.C. Bhadoo, &
Hon'ble Shri Sunil Kumar Sinha, JJ.

JUDGMENT
(23.10.2007)

The following judgment of the Court was delivered by

Sunil Kumar Sinha, J,

(1) The 9th Additional Sessions Judge (F.T.C), Raipur, has convicted and sentenced the appellants in Sessions Trial No.402/2000 by judgment and order dated 28.12.2002. All the appellants have been convicted u/s 302/34 I.P.C. and sentenced to undergo imprisonment for life. In addition to it, appellants Bharat, Shankar and T. Jagannath @ Jagga have also been convicted u/s 323 I.P.C. and sentenced to undergo R.I. for six months, with further direction to run the sentences concurrently. The appellants were charged u/s 302/34 I.P.C., for committing murder of Harendrapal. They were also charged u/s 307 I.P.C. for attempting life of Balkishan (P.W.16). Shankar and T. Jagannath @ Jagga were also charged u/s 323 I.P.C. for causing simple injuries to Tara Devi (P.W.15).

(2) The case of the prosecution is that on 28.8.2000 at about 10.30 p.m. Tara Bai (P.W.15) gave *Dehati Nalishi* (Ex.P.19) in Mission Hospital, Tilda to A.S.I., Ram Kumar Vaishnav (P.W.12) to the effect that on 28.8.2000 at about 9 O' clock they were sleeping in their house. About 10.30 they heard hue and cry of their elder son namely Harendra (since deceased). When she along-with her husband and daughter Kavita came out from the house, they saw that Harendra was being beaten by Shankar Gond, Jagga Telugu, Motali @ Bhola Gond and Bharat Thakur. They were beating him with Shovel, wooden-club and stones. When they tried to intervene, the appellants also assaulted her (Tara Bai) and her husband Balkishan. Thereafter, *Dehati Merg* intimation, Ex.P.20 was recorded, based on which, First Information Report Ex.P.21 was recorded. The information regarding death of Harendrapal was also recorded under Ex.P.22. The investigating officer gave notice to the *Panchas* under Ex.P.25, prepared inquest on the body of the deceased under Ex.P.26. Plain soil, blood stained soil along-with a piece of brass chain, one iron chain and a blood stained boulder were seized from the place of occurrence vide Ex.P.26. The site plan was prepared under Ex.P.7 by A.S.I., Satyendra Pandey (P.W-18). Another site plan was prepared under Ex.P.13 by Patwari. The dying declaration of Balkishan was recorded under Ex.P.12. After taking accused persons into custody, memorandum of accused Shankar was recorded under Ex.P.1, based on which,

shovel and its broken wooden handle were seized under Ex.P.2. Memorandum of accused T. Jagannath was recorded under Ex.P.3 based on which a club was seized under Ex.P.4, memorandum of Bholanath @ Motali was recorded under Ex.P.5, based on which another club was seized under Ex.P.6. The seized articles were sent to Forensic Science Laboratory, Raipur, from where report Ex. P-38 was received. According to the F.S.L. report, blood was found on almost every article except on two samples of plain soil and the wooden handle of the shovel i.e., articles B, D & I. The bed-head ticket of Balkishan Ex.P.32 was seized. His examination report dated 10.10.2000 (Ex.P-35) from Agrasen Hospital, Raipur was collected. His X-Ray report of the same hospital dated 10.10.2000 was also collected vide Ex.36, according to which, there were fractures on his left scapula bone and left wrist. His other X-Ray report dated 6.11.2000 (Ex.P.37) was also collected, according to which, his 2-5 ribs of the right side were fractured. The body of the deceased was sent for postmortem examination to Primary Health Center, Tilda, under Ex.P.14. The postmortem was conducted by Dr.A. A. Siddiqui (P.W.20), who prepared his report Ex.P.34 in which he noticed the following external injuries:

(i) One lacerated wound 3cms x 1cm x bone deep, 12cms above the right ear;

(ii) One lacerated wound 5cms x 1cm x bone deep over scalp of the head situated at 2 cm away and towards left from injury no.1;

(iii) One lacerated wound over right auricle of pinna upper 1/3rd region 2.5cms x .5cm x whole thickness;

(iv) One contusion over right shoulder to sterno clavicalar region of chest 25cms x 3.5cms;

(v) One lacerated wound over left fore-arm posterior aspect in size of 2cms x 1.5cms x bone deep, fracture of radio ulna present;

(vi) One lacerated wound over lower 1/3rd part of left thigh posterior aspect 2.5cms x 1.5cms x bone deep, fracture of Femur bone present;

(vii) One lacerated wound 8 cms above injury no.6, 2cms x 1.5cms x muscle deep;

(viii) One lacerated wound over left ankle of foot 5cms x 2cms x bone deep having depressed fracture of underlying bone;

(ix) One contusion bluish colored over right flank of abdomen.

In the internal examination, clotted blood was found beneath the head injury. There was depressed fracture of temporal and parietal bone. Brain membrane and some portion of brain were lacerated. Sterno clavicalar bone was also fractured.

(3) After usual investigation, the charge sheet was filed in the Court of J.M.F.C., Raipur, who in turn committed the case to the Sessions Judge, Raipur, from where it was received on transfer by the 9th Addl. Sessions Judge (F.T.C), who conducted the trial and convicted and sentenced the accused appellants as aforementioned.

(4) Learned counsel for the appellants have not disputed the homicidal death of deceased Harendra. Moreover, it comes in the evidence of Tara Devi (P.W.15) & Bal Kishan (P.W.16) that on the fateful night the deceased was assaulted by the appellants. Shankar assaulted him with shovel and Bhola & Jagga assaulted with club and accused Bharat Singh assaulted him with stones. When they had gone to rescue the deceased, Shankar assaulted Balkishan by shovel on his head and back and the appellant Bharat, Jagga, Shankar & Bhola have pushed Tara Devi. This ocular evidence of these witnesses is supported by the medical evidence of Dr.A.A. Siddiqui, who conducted the postmortem on the body of the deceased and found the above injuries. Therefore, on the basis of this ocular and medical evidence, it is established that the death of the deceased Harendra was homicidal in nature.

(5) Learned counsel for the appellants have argued that P.W.15 Tara Devi and P.W.16 Balkishan are not the reliable witnesses, they are interested witnesses being the mother and father of the deceased and therefore, their testimonies are doubtful. Even their presence on the place of occurrence is also doubtful. They further argued that even otherwise also they have given omnibus statement about the assault given to the deceased and it has not

been established as to who gave the fatal blow to the deceased, therefore, looking to the head injury of the deceased, in which, depressed fracture was found and it was said to be the reason to cause Coma to the deceased which further became the cause of his death, the conviction of the appellants u/s 302/34 IPC cannot be sustained and their case would not travel beyond section 304 Part-II read with section 34 of the I.P.C.

(6) To appreciate the above argument, we have perused the evidence of P.W.15 Tara Devi & P.W.16 Balkishan. P.W.15 has deposed that her son died on 28th of August 2000. On the fateful night, all the family members were sleeping in their rooms. She along-with her husband and daughter was sleeping in one room and the deceased along-with his wife and children had gone to sleep in a different room. At about 10.30 she heard the cries of her son. On hearing so, she along-with her husband and daughter came out from the house. The houses of accused Shankar and Bharat are situated near their house. She saw that near the *peepal* tree, Shankar, Bhola, Jagga and Bharat Singh were assaulting her son. Shankar was assaulting with a shovel, Bhola & Jagga were assaulting with *Dandas* and Bharat Singh was assaulting with stones. When her husband went to rescue Harendra, accused Shankar assaulted her husband with shovel on his head and back and in that process accused Bharat, Jagga, Shankar and Bhola pushed her due to which she received injuries on her leg, elbow of left hand and just below the left eye. On her hue and cry, Ganpat and Babulal came over there. In para 2, she deposed that Ganpat had telephoned to Century Cement from where Ambulance from security department came to the place of occurrence and took her husband, whereas, her son Harendra who died on the spot, was left there. She has reported the matter to the Police. This witness has been put to lengthy cross examination but nothing has been brought on record to show that either she has not witnessed the occurrence or she is giving a false version of it. However, she has admitted in Para 8 that only Shankar had pushed her.

(7) Balkishan (P.W.16) has deposed that on the fateful night, after hearing the cry of his son Harendra, he came out from the house and saw that Harendra was being beaten by Bhola, Shankar, Jagga and Bharat by lathi, stones and rod. When he went to intervene, Shankar has assaulted him with shovel on his head due to which he sustained head injury. Appellant Jagannath had assaulted him with Danda and appellant Bharat had assaulted him with stone on his back and waist. After the assault, he became unconscious. He regained consciousness in Mission Hospital, Tilda. He was referred to the Medical College Hospital where he was admitted for 10-15 days. In his cross examination, he had admitted that he had made statement to the police regarding keeping of rod by the accused persons and had also stated that accused Bharat had assaulted with stones on his back and waist and if these facts are not mentioned in his police case diary statement, Ex.D-2, he cannot tell the reasons for the same. Besides the above, nothing adverse has been brought in the cross examination of this witness.

(8) As far as the presence of these witnesses at the scene of occurrence is concerned, admittedly, these two witnesses are the injured witnesses and they were sent for medical examination to the Doctor, therefore, their presence on the scene of occurrence cannot be doubted. So far as the testimonies of these witnesses on account of being father and mother of the deceased and thereby being interested witnesses is concerned, it has been held by the Apex Court in many matters that the relationship is not a factor to affect the credibility of a witness. It is more often than not that the relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if a plea of false implication is made. In such cases, the Court has to adopt the careful approach and analyze the evidence to find out whether it is cogent and credible that is to say that their evidence has to be scrutinized with great care and circumspection. Please see ***AIR 2007 S.C. 1299 – Kalegura Padma Rao & another –vs- The State of A.P***.

(9) After close scrutiny of these two witnesses, it is writ large on record that they were present at the scene of occurrence and they had also received injuries in the said occurrence. The defence has not been able to bring on record any such circumstance on which their testimonies should be discarded. After careful scrutiny of evidence of these two witnesses, it has been established that all the 4 appellants had participated in the crime in question and at that time appellant Shankar was armed with shovel and two other appellants i.e., Bhola & Jagga were armed with *Dandas* and Bharat Singh was carrying stones and they all were assaulting the deceased. Therefore, the complicity of the accused persons in crime in question has been fully established by the evidence of these two witnesses. Their evidence is further corroborated by the medical evidence of the Doctor who had conducted the postmortem on the body of the deceased as also from the memorandum given by the appellant Shankar, T. Jagannath @ Jagga and Bholanath @ Motali u/s 27 of the Evidence Act, on which, a shovel was seized from the possession of Shankar and two clubs were seized from the possession of above two appellants. On those articles blood stains were found as per the report of F.S.L., Raipur, Ex.P.38, therefore, the evidence regarding complicity of the accused persons in crime in question is writ large on record and the evidence of P.W.15 and P.W.16 cannot be discarded.

(10) Now the question arises that in the facts and circumstances of the case, particularly on the face of evidence of P.W.15 & P.W.16 as also the Doctor, which offence is made out against the accused persons. Learned counsel for the appellants have argued that two eye witnesses could not disclose as to who gave fatal injury to the deceased and only one injury on the head of the deceased which resulted into fracture was fatal, therefore, all the accused persons cannot be convicted u/s 302/34 I.P.C. in absence of any evidence of common intention to cause death and looking to the nature of injuries found on the body of the deceased only their knowledge can be attributed and the offence committed by them would not travel beyond section 304 Part II/34 I.P.C. They placed reliance on the decisions of the Apex Court in the matters of ***Panchaiah and***

others –vs- State of Karnataka, 1994 Supp (2) SCC 235 and Sarman and others –vs- State of M.P., 1993 Supp (2) SCC 356.

(11) In the matter of *Panchaiah (supra)*, six injuries on various parts of the body of deceased were caused by cycle chain and club. The first injury was lacerated wound on the middle of the head measuring 2cms x 1cm and bone deep. The second injury was a bruise (exhymosis) black coloured on the antero laternal aspect of the right arm extending from the right shoulder joint aspect measuring 23cms x 9cms. The third injury was again a bruise (exhymosis) black coloured on the interior aspect of the left upper arm upto the left elbow joint measuring 10cms x 9cms. The fourth injury was an abrasion black colour on the left patella measuring 3cms x 2cms. The fifth injury was also abrasion black colour just middle to the injury no.4. The last injury was again only an abrasion on the left side of the abdomen at the level of the umbelious 6cms. The doctor opined that there was extravasation of blood just below the head injury no.1. He opined that the death was the result of shock and hemorrhage. He further opined that injury to the brain and the vessels was due to external injury no.1. Injuries 1, 4 & 5 would be caused by a hit with a cycle chain. The Apex Court held that the medical evidence shows that there was only one injury, which was serious, on the head and the other injuries were only bruised abrasions and if really the intention of the appellants was to cause death, they would have inflicted more serious injuries. The Apex Court found that only one injury on the head which unfortunately resulted in extravasation of the blood causing injury to brain and under these circumstances it cannot be said that the accused persons had common intention to cause the death of the deceased. However, the injuries inflicted would show that they had only knowledge in which case they are punishable u/s 304 Part II read with section 34 I.P.C.

(12) In *Sarman's case (supra)* the Doctor, P.W.19 who conducted the postmortem, noticed 17 injuries. Out of them injury nos.1, 3, 10, 11 and 14 were described as incised wounds. Though they resulted in bleeding but no other damage was noticed. It was only injury no.15 which has resulted in a depressed fracture of parietal

bone and ultimately proved in membrane puncture. Though the Doctor in general way stated, cause of death was due to multiple injuries but he has specifically stated that on injury no.15, he noticed a depressed fracture of parietal bone which individually was sufficient to cause death of the deceased. It was a case in which the prosecution could not prove that which of the accused caused the fatal injury. The Doctor, who conducted the postmortem, while opining generally that the multiple injuries caused the death, specifically stated that the depressed fracture was individually sufficient to cause death of the deceased. The Apex court held that which of the accused has caused the fatal injury was not pointed out by the prosecution, therefore, in the circumstances all the accused persons cannot be said to have the common object of committing the murder of the deceased, though they may have knowledge that the blows given were likely to cause death and if any one of the accused exceeded the common object and acted on his own, that would be his individual act but in absence of evidence as to who acted so, conviction of accused appellant u/s 302/149 cannot be sustained and sentence of life imprisonment altered to that u/s 304 Part II/149 sentencing 7 years R.I.

(13) In the present case also, though 9 external injuries were found on the body of the deceased, but Dr.A.A. Siddiqui (P.W.20), who conducted the postmortem on the body of deceased opined vide his report Ex.P.34 that the cause of death was Coma as a result of head injury. The evidence of P.W.15 & P.W.16 would show that they could not depose as to who caused the fatal injury on the head of the deceased, which was injury no.2, under which, there was depressed fracture of temporal and parietal bone and brain membrane and some portion of the brain were also damaged. Therefore in absence of any evidence of common intention to cause the death of the deceased, in the facts and circumstances of the case, all the accused persons cannot be said to have the common intention to commit murder of the deceased, though they have the knowledge that the blows given were likely to cause death. If any one of the accused exceeded the common intention and acted on his own that would be his individual act but in absence of the

evidence as to who acted so conviction of all the accused persons with the aid of section 34 u/s 302/34 of the I.P.C. would not be possible. But since there is evidence of their knowledge that the blows given were likely to cause death for which they were sharing common intention, they would be convicted u/s 304 Part-II read with section 34 IPC.

(14) In the result, appeals partly succeed. The conviction and sentence imposed upon the appellants u/s 302/34 IPC are set aside. Instead, appellants are convicted u/s 304 Part II/34 of the I.P.C. and sentenced to undergo R.I. for 7 years. However, the conviction and sentence awarded to the appellants Bharat, Shankar & T. Jagannath @ Jagga u/s 323 IPC are upheld. The direction to run the sentences concurrently is also upheld. The appellants shall be entitled to set-off for the period already undergone by them against the above sentences awarded to the appellants.

Sd/-
L.C. Bhadoo
Judge

Sd/-
Sunil Kumar Sinha
Judge